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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

REGGIE LAMONT HALL,

Defendant and Appellant.

F066471

(Super. Ct. No. F12904791)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison, Judge.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Eric L. Christoffersen, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Detjen, J., and Franson, J.

INTRODUCTION

Appellant Reggie Lamont Hall was charged in an information, on July 27, 2012, with robbery (Pen. Code, § 211, count 1)¹ and street terrorism (§ 186.22, subd. (a), count 2). Count 1 alleged that appellant committed robbery for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and was armed with a firearm during the commission of the offense (§ 12022, subd. (a)(1)). The information also alleged two prior prison term enhancements (§ 667.5, subd. (b)).

On September 18, 2012, the trial court bifurcated count 2 and the gang enhancement allegation in count 1. Appellant admitted the prior prison term enhancements. The court granted the People's motion to dismiss the firearm allegation. On October 1, 2012, a jury found appellant guilty of robbery as alleged in count 1. On October 2, 2012, appellant admitted the gang enhancement allegation in count 1 and plead guilty to count 2.

On November 6, 2012, the court sentenced appellant to prison for three years on count 1, plus a consecutive term of ten years for the gang enhancement alleged in that count. The court sentenced appellant to a consecutive term of one year on one prior prison term enhancement for a total prison term of 14 years. The court sentenced appellant to a term of two years on count 2, but stayed sentence on count 2 pursuant to section 654. The court granted total custody credits of 169 days. The court imposed fees of \$80 pursuant to section 1465.8 and \$60 pursuant to Government Code section 70373.

Appellant contends he was improperly convicted of both robbery and active participation in a criminal street gang because robbery was a necessarily included offense of active participation in a criminal street gang. Appellant also argues that because the fees as listed above were imposed on a per count basis, both fees must be reduced if we

¹ All statutory references are to the Penal Code, unless otherwise indicated.

reverse his conviction for robbery on count 1. We reject appellant's contentions and affirm the trial court's judgment.

FACTS

On May 29, 2012, Nestor Beas was at Fashion Fair Mall in Fresno at 4:00 p.m. looking for his friend, Stephanie Hannemann, to give her a ride home. Beas was standing next to his car talking to Hannemann on his cell phone. Appellant and co-defendant Stephon Mack approached Beas. Beas asked appellant and Mack if he could help them. They stared at Beas for a couple of minutes and said nothing.

Mack asked Beas if he "banged." Beas replied that he did not and was in the Air Force. Mack claimed Beas and some other guys beat him up the week before. Beas denied the allegation and reiterated that he was not a "gang banger." Mack replied that he did not believe Beas's "Air Force nonsense." Beas had never seen appellant or Mack before.

Appellant lifted up his shirt showing what looked like a pistol and demanded that Beas give him his phone. Beas gave appellant his white iPhone 4. Beas was afraid he would be shot if he did not comply with the demand. Mack walked over to Beas's car, pulled out Beas's wallet, looked through the wallet, and pulled out Beas's identification. After examining the identification, Mack threw it and the wallet back into the car. Mack told Beas not to look at him or he was going to hit Beas.

Beas continued to look at Mack and appellant. Mack told Beas not to give him a reason to hit him. Mack and appellant drove off in a white SUV with other people in it. Beas and Hannemann followed the SUV in Beas's car to get the license plate number. They called the police at a Chevron station at Shaw and First after Hannemann got the license plate number. Fresno Police Detective Brendon Rhames arrived in 10 minutes. While Beas was giving Detective Rhames a statement, the white SUV stopped at the light

and the people inside kept staring at Beas. The people in the SUV pointed at Beas and screamed stuff.

Detective Rhames broadcast the location of the vehicle with the license plate number. The suspects were later apprehended. The suspects abandoned the SUV. A resident saw the SUV being followed by three patrol cars. The SUV stopped in a cul-de-sac just off of Ashlan and the occupants exited the vehicle. They were pursued by police officers.

The suspects were seen fleeing on foot in the area of Fresno and Ashlan. Officer Tim Sullivan was approached by someone who had seen a suspicious person enter the American Music Store. After a short chase, appellant was apprehended outside the store with Beas's iPhone in his pocket. Mack and appellant's fingerprints were found on various surfaces of the abandoned SUV.

NECESSARILY INCLUDED OFFENSES

Appellant contends that any underlying felony committed when participating in a criminal street gang, here a robbery, is a necessarily included offense of the substantive offense of participation in a criminal street gang. Following the statutory elements test, as prescribed by our Supreme Court, we reject appellant's contention and affirm the trial court's judgment.

There are two tests for determining whether one offense is necessarily included in another, the statutory elements test and the accusatory pleading test. Where the case involves the conviction of multiple alternative *charged* offenses, courts should apply only the elements test. Courts should apply both the statutory elements test and accusatory pleading test in deciding whether a defendant received notice, and may be convicted, of an *uncharged* crime. (*People v. Ramirez* (2009) 45 Cal.4th 980, 984-985 (*Ramirez*); see generally *People v. Lopez* (1998) 19 Cal.4th 282, 288.) The accusatory pleading test does

not apply in deciding whether multiple convictions of charged offenses is proper.

(*People v. Reed* (2006) 38 Cal.4th 1224, 1229.)

Under the statutory elements test, courts look strictly to the statutory elements, not to the specific facts of the case. We inquire whether all of the statutory elements of the lesser offense are included within those of the greater offense. If a crime cannot be committed without also committing the lesser offense, the latter is a necessarily included offense. (*Ramirez, supra*, 45 Cal.4th at p. 985.) In answering this question, we do not consider the underlying facts or the accusatory pleading. (*People v. Sanders* (2012) 55 Cal.4th 731, 739.) The court considers in the abstract whether one offense is included in the other. (*Ibid.*; *People v. Sanchez* (2001) 24 Cal.4th 983, 988.)

The statutory elements of the substantive crime of active participation in a criminal street gang are: (1) active participation in a criminal street gang with participation that is more than nominal or passive; (2) knowledge that the gang's members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. (§ 186.22, subd. (a); *People v. Lamas* (2007) 42 Cal.4th 516, 523; *People v. Rios* (2013) 222 Cal.App.4th 542, 558.) The elements of robbery are: (1) the felonious taking of personal property in the possession of another; (2) from the person or the person's immediate presence; (3) against the person's will; (4) accomplished by means of force or fear. (§ 211; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 544; *People v. Vargas* (2002) 96 Cal.App.4th 456, 463.)

Appellant's argument rests primarily on his contention that he could not have committed street terrorism without committing a necessarily underlying offense, here a robbery.² Under the statutory elements test, however, it is manifest that the statutory

² Appellant relies in part on *People v. Mesa* (2012) 54 Cal.4th 191, 197 (*Mesa*). The *Mesa* case, however, did not analyze the issue of what constitutes a lesser included

elements of street terrorism do not include all of the elements of attempted murder, robbery, vehicle theft, receiving stolen property and mayhem. Utilizing the statutory elements, a defendant can be convicted of street terrorism without ever committing an attempted murder, a robbery, a vehicle theft, receiving stolen property, or committing mayhem. Promoting or furthering any felonious criminal conduct will do. Because the elements of the purportedly included offenses, here a robbery, are not common to street terrorism, they are not necessarily included offenses under the statutory elements test. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944-945 (*Burnell*).)

Appellant was convicted of two *charged* offenses, the substantive offense of promoting a criminal street gang and robbery. Under the authority of our Supreme Court, we are constrained to analyze this case under the statutory elements test.³ Under the statutory elements test, we do not review the information or the underlying facts of the appellant's offense. The elements of the two charged offenses are not the same. We therefore conclude that appellant's conviction for robbery is not necessarily included in the offense of promoting a criminal street gang. We find *Burnell* dispositive and apply its holding here. (*Burnell, supra*, 132 Cal.App.4th at pp. 944-945.)

offense. The court in *Mesa* held that where one or more underlying felonies are committed along with the substantive offense of participation in a criminal street gang, the sentence for the substantive offense of participation in a criminal street gang must be stayed pursuant to section 654. *Mesa* left intact the consecutive sentence for the enhancement of participation in a criminal street gang. (*Mesa, supra*, 54 Cal.4th at pp. 197-201.) Here, the trial court precisely followed the sentencing procedure set forth in *Mesa*, and stayed appellant's sentence pursuant to section 654 in count 2 for the substantive offense of participation in a criminal street gang and sentenced appellant consecutively for the gang participation enhancement.

³ The holdings of our Supreme Court are binding on all of the lower courts of the state, including this court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Because we reject appellant's assertion that count 1 must be reversed, we further reject appellant's assertion that his fees pursuant to section 1465.8 and Government Code section 70373 must be reduced based on the reversal of that count.

DISPOSITION

The judgment is affirmed.